92-1553

No. ——

Supreme Court, U.S.
FILED
MAR 25 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES G. MESSER,
Petitioner,

v.

CITY OF DOUGLASVILLE, GEORGIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

DAVID H. FLINT *
MARK W. FORSLING
SCHREEDER, WHEELER & FLINT
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the prohibition on all signs in the central business district in Douglasville, Georgia, except for those directing attention to products, services, activities or entertainment conducted, sold or offered on the premises on which the sign is located, constitutes an unconstitutional preference for commercial over noncommercial signs and an unconstitutional prohibition of the conveyance of ideas in violation of the First and Fourteenth Amendments.

2. Whether the exemption of certain types of signs from the permitting requirements and fees imposed by the Douglasville, Georgia, sign ordinance is an infringement of the First and Fourteenth Amendments.

3. Whether the provisions of the Douglasville, Georgia, sign ordinance requiring those posting a political or specific event sign to post a $500 bond, while imposing no similar burden on others, is an infringement of the First and Fourteenth Amendments.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES	2
STATEMENT OF THE CASE	3
A. Statement of Facts	3
B. History of Proceedings	4
REASONS FOR GRANTING THE WRIT	5
I. THE WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS ON THE SAME MATTER AND IS IN CONFLICT WITH CONTROLLING PRECEDENT OF THIS COURT	5
II. THE COURT OF APPEALS' DECISION UPHOLDING THE SECTION OF THE DOUGLASVILLE SIGN ORDINANCE WHICH ALLOWS THE PLACEMENT OF CERTAIN NONCOMMERCIAL MESSAGES WITHOUT A PERMIT, WHILE REQUIRING OTHERS TO BE PERMITTED, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT	18

TABLE OF CONTENTS—Continued

Page

III. SECTION 26-18 OF THE DOUGLASVILLE SIGN ORDINANCE IS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE THE BOND REQUIREMENT CONTAINED THEREIN IS NOT THE LEAST INTRUSIVE MEANS OF REQUIRING THE REMOVAL OF POLITICAL SIGNS AFTER AN ELECTION AND BECAUSE IT REGULATES POLITICAL SPEECH MORE STRINGENTLY THAN NONPOLITICAL SPEECH.. 20

CONCLUSION 25

TABLE OF AUTHORITIES

United States Supreme Court Decisions — Page

Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) 21

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) 22

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ..... *passim*

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971) 21

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) 24

Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) 23, 25

Regan v. Taxation With Representation of Washington, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) 24

Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) 21

Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed 155 (1939) 22, 23, 25

United States Court of Appeals Decisions

Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989) 6, 14, 16

Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993) 23

Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977) 22, 23

Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985) 18

Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992) 1, 5

National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) 6, 15, 20

National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990) 6, 15, 20

TABLE OF AUTHORITIES—Continued

Page

National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2nd Cir. 1991) 16
Verrilli v. City of Concord, 548 F.2d 262, *modified on other grounds*, 557 F.2d 664 (9th Cir. 1977) .. 23
Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988) 6, 12, 13, 14, 16

United States District Court Decisions

Bacon v. Bradley-Bourbonnais High School District, 707 F. Supp. 1005 (C.D.Ill. 1989) 24
Jackson v. City Council of Charlottesville, 659 F. Supp. 470 (W.D. Va. 1987), *modified on other grounds*, 840 F.2d 10 (4th Cir. 1988) 18
Metromedia, Inc. v. Mayor and City Council of Baltimore, 538 F. Supp. 1183 (D.Md. 1982) 16, 17

State Appellate Court Decisions

Adams Outdoor Advertising v. Newport News, 373 S.E.2d 817 (Va. 1988) 18, 20
Metromedia, Inc. v. City of Des Plaines, 26 Ill. App. 3d 942, 326 N.E. 2d 59 (1st Dist. 1975) 18
Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio State 2d 539, 433 N.E. 2d 198 (1982) 18

Constitutional Provisions, Statutes and Ordinances

First Amendment to the United States Constitution ..... *passim*
Fourteenth Amendment to the United States Constitution ..... *passim*
42 U.S.C. 1983 ..... 3, 4
11 C.F.R. § 110.11 21
Douglasville Sign Ordinance ..... *passim*

Other Authorities

L. Tribe, American Constitutional Law, 1459 (2nd Ed. 1988) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

JAMES G. MESSER,

Petitioner,

v.

CITY OF DOUGLASVILLE, GEORGIA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992). (App., *infra*, p. 1a.)

2. Order, United States District Court for the Northern District of Georgia, Case No. 1:90-CV-1521-RCF, entered June 26, 1991. (App., *infra*, p. 20a.)

3. Order, United States District Court for the Northern District of Georgia, Case No. 1:90-CV-1521-RCF, entered September 25, 1991. (App., *infra*, p. 26a.)

STATEMENT OF JURISDICTION

1. The date of the entry of the judgment or decree sought to be reviewed is October 22, 1992. On that date the United States Court of Appeals for the Eleventh Circuit affirmed the order of the United States District Court

for the Northern District of Georgia entering summary judgment in favor of the respondent.

2. On December 28, 1992, the United States Court of Appeals for the Eleventh Circuit entered an order denying petitioner's petition for rehearing and suggestion of rehearing en banc.

3. The statutory provision which confers jurisdiction on this court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. The First Amendment to the United States Constitution provides as follows: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Sections 26-1, 26-4, 26-7(9), 26-8(b)(6), 26-8(c)(3), 26-8(c)(5), 26-8(c)(6), 26-8(c)(9), 26-8(c)(10), 26-16, 26-17, 26-26, 26-27 and 26-28 of the Douglasville, Georgia sign ordinance. Because the aforesaid provisions are lengthy, the text of these sections of the Douglasville, Georgia sign ordinance are set forth in the appendix attached hereto.

4. 42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner owns real estate located in the City of Douglasville, Georgia, which is located in the central business district adjacent to a United States highway and across the road from the railroad tracks. The City of Douglasville has designated most of the central business area as an "historic district." Petitioner operates an automobile paint and body shop on his property and has erected an on-premise sign identifying his place of business.

In 1988, petitioner was approached by Adams Outdoor Advertising of Atlanta, Inc., Jimbo Displays, Inc. and Holland Outdoor Displays, Inc. These three corporations sought to lease a site on petitioner's property for the erection of an off-premise advertising sign, i.e. a sign either advertising products, services or activities not sold or conducted on the premises or conveying a noncommercial message. Adams Outdoor is engaged in the outdoor advertising business in the Atlanta, Georgia, metropolitan area. Jimbo Displays, Inc. and Holland Outdoor Displays, Inc. construct outdoor advertising structures and sell them to others.

Petitioner leased a portion of his property to Jimbo Displays for the erection and maintenance of an off-premise advertising structure. The City of Douglasville issued a permit for an off-premise advertising sign to be placed on petitioner's tract, but because the sign was not placed in the exact location allowed by the permit, the City later revoked the permit and stated that it considered the sign to be in violation of the City's ban on off-premise advertising signs in the Douglasville historic district. George Holland, an officer of Jimbo Displays and Holland Outdoor, appealed the permit revocation to the Douglasville Board of Adjustments and Appeals, but the appeal was denied. The sign was then removed.

B. History of Proceedings

This action was commenced by the filing of a complaint on July 12, 1990, in the United States District Court for the Northern District of Georgia, Atlanta Division. Jurisdiction was based upon 28 U.S.C. §§ 1331, 1343 and 2202.

The complaint was brought in four counts. Count I is a First and Fourteenth Amendment facial challenge to a number of provisions of the Douglasville, Georgia, sign ordinance. Count II is a Due Process challenge to certain provisions of the Douglasville sign ordinance which petitioner believes fail to provide any objective standards to guide the Board of Adjustments and Appeals in determining when a variance should be granted. Count III is a claim for damages pursuant to 42 U.S.C. § 1983, and count IV seeks an injunction preventing the City of Douglasville from issuing a threatened citation against the petitioner. It is only the First and Fourteenth Amendment allegations contained within count I of the complaint which are the subject of this petition for certiorari.

On February 4, 1991, petitioner filed a motion for summary judgment to which the respondent replied and filed a cross-motion. By order entered on June 26, 1991, the

district court ruled that the ordinance does not discriminate against noncommercial speech as opposed to commercial speech in violation of the First and Fourteenth Amendments. The district court also ruled that petitioner lacked standing to challenge the variance powers given to the Douglasville Board of Adjustment and Appeals. With respect to petitioner's remaining First and Fourteenth Amendment challenges, the district court held that petitioner had standing and directed the respondent to brief those issues on the merits.

Following additional briefs by both parties, in an order entered on September 25, 1991, the district court granted the remainder of the respondent's motion for summary judgment. The district court's orders were affirmed by the United States Court of Appeals for the Eleventh Circuit in *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS ON THE SAME MATTER AND IS IN CONFLICT WITH CONTROLLING PRECEDENT OF THIS COURT.

The initial question considered by the Eleventh Circuit was whether the prohibition on all signs in the Douglasville historic district, except for those directing attention to products, services, activities or entertainment conducted, sold or offered on the premises on which the sign is located, constitutes an unconstitutional preference for commercial over noncommercial signs and an unconstitutional prohibition on the conveyance of ideas in violation of the First and Fourteenth Amendments. In considering this question, the Eleventh Circuit aligned

itself with the decision reached by the Sixth Circuit in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988), in finding that the Douglasville sign ordinance is viewpoint neutral. The decisions of the Eleventh Circuit, and the Sixth Circuit in *Wheeler*, are in direct conflict with the decisions of the First Circuit in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), and the Second Circuit in *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990). *See also National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 n.3 (9th Cir. 1988) (without deciding the question before this Court, the Ninth Circuit noted that the plurality opinion in *Metromedia*, *infra*, suggests an on-site/off-site distinction between noncommercial messages like the one enacted by Douglasville would be invalid).

Furthermore, the decisions reached by the Sixth Circuit in *Wheeler* and by the Eleventh Circuit are in direct contradiction to this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). This Court should grant certiorari in this case to resolve the conflict among the Circuit Courts of Appeals and to correct the erroneous decision of the Eleventh Circuit.

The starting point for any analysis of an ordinance regulating the placement of advertising signs must be this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). In *Metromedia*, the Court struck down an ordinance which prohibited most outdoor advertising signs. The ordinance exempted two types of signs: (i) on-site signs, defined as signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises, or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed; and (ii)

certain specific types of signs, described by the Court as including government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, but not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs. 453 U.S. at 494-95, 101 S.Ct. at 2886. In finding the San Diego ordinance unconstitutional in a plurality opinion, the Court reached three significant conclusions.[1]

First, it held that San Diego was free to place a greater value upon on-site commercial advertising than on the interests underlying the general ban on billboards, which were traffic safety and aesthetics. *Id.* at 512, 101 S.Ct. at 2895 ("The city has decided that in a limited instance —on-site commercial advertising—its interests should yield. We do not reject that judgment"). *See also id.* at 541, 564-65, 569-70, 101 S.Ct. at 2909, 2921-22, 2924. Thus, San Diego could constitutionally exempt some signs from the general ban.

Second, the Court held that the city could exempt on-site commercial signs without also exempting off-site commercial signs. 453 U.S. at 512, 101 S.Ct. at 2895 (". . . the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there that it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere"). *See also id.* at 541, 564-65, 569-70, 101 S.Ct. at 2909, 2921-22, 2924. Thus, a majority saw no consti-

---

[1] Each of these had support from at least five justices, although not from the same configuration.

tutional problem in distinguishing between on-site and off-site commercial speech.

Third, the Court held that San Diego could not prohibit the display of noncommercial messages in places where commercial billboards were permitted. Once the City had decided that its interests in on-site commercial advertising outweighed its interests in aesthetics and traffic safety, and therefore that certain billboards should remain despite their safety and aesthetic consequences, it could not then restrict the content of those billboards to commercial messages. The plurality stated as follows:

> Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

453 U.S. at 513, 101 S.Ct. at 2895 (footnote omitted).

The Douglasville ordinance before this Court violates the third holding of *Metromedia* because, due to its definitions of on-site and off-site signs, it prohibits the display of noncommercial messages in places where commercial signs are permitted. An on-premise sign, as defined in Section 26-4 of the ordinance, always directs attention to a building, profession, product, service, activity or entertainment conducted, sold or offered on the property upon which the sign is located. As a result, an on-premise sign can bear a noncommercial message only in the rare instance in which the premises on which it is placed is the local office of a noncommercial enterprise. Noncommercial enterprises which do not have local offices in the City of Douglasville are prohibited from placing messages on any signs in the central business district and certain other areas of the City. Display of noncommercial speech should not be limited to premises connected with the noncommercial activity because ideas, political causes and social issues rarely have an office.

By their definition, off-premise advertising signs direct attention to a building, profession, product, service, activity or entertainment not conducted, sold or offered on the property upon which the sign is located. Sign ordinance § 26-4. Accordingly, except in the limited instances where noncommercial enterprises have offices in the City of Douglasville, the ordinance prohibits the display of noncommercial messages (which must be placed on off-premise signs) in all areas of the City where off-premise signs are prohibited, while allowing the posting of commercial messages on-premise signs in all of those areas. As a result, the discrimination imposed by the sign ordinance in favor of on-premise signs against off-premise signs violates the holding of *Metromedia*.

The sign ordinance favors on-premises signs over off-premise signs in at least eight ways. The first manner in which the ordinance discriminates in favor of on-premise signs is found in Section 26-28(7) of the ordinance. That section of the ordinance prohibits the placement of off-premise advertising signs in an area of the City of Douglasville known as the Douglasville Historic District. Section 26-27(3) of the sign ordinance allows on-premise commercial signs within the Douglasville Historic District. The result of these provisions of the ordinance is that petitioner is prohibited by the sign ordinance from posting a noncommercial message on the sign allowed on his property, while he may continue to maintain the commercial sign on his property advertising his automobile body shop.

Second, the ordinance discriminates against off-premise advertising signs by the provisions of Section 26-27(9) which prohibit the placement of those signs within 300 feet of any officially designated historical site or monument. No similar prohibition is enforced against on-premise signs. As a result, Section 26-7(9) of the ordinance discriminates against off-premise signs, which may bear noncommercial messages, in favor of on-premise signs, which are limited to commercial messages.

Third, the ordinance discriminates against noncommercial messages in Section 26-8(c)(5) by requiring that off-premise signs be no less than 1,000 feet apart in a number of instances, while there is no spacing requirement for on-premise commercial signs.

Fourth, the ordinance requires in Section 26-8(c)(6) that off-premise signs located adjacent to the interstate highway right-of-way shall be no less than 1,000 feet apart while no such restriction is imposed upon on-premise signs. As a result, since under Section 26-8(c)(5) of the ordinance the owner of a lot where a business, profession, product, service, activity or entertainment is conducted, sold or offered must choose between placing an on-premise commercial sign or off-premise noncommercial sign on his lot, in those instances where the owner's lot is adjacent to an interstate highway and is within 1,000 feet of an existing off-premise sign, the owner has no choice but to erect an on-premise commercial sign. He is barred by the sign ordinance from erecting a noncommercial off-premise sign in that instance. This results in discrimination in favor of commercial advertising signs against noncommercial advertising signs.

Fifth, Section 26-8(c)(5) of the ordinance limits the number of off-premise signs at an interchange adjacent to an interstate highway to two, but the sign ordinance provides no limitation on the number of on-premise signs at such interchanges. This limitation discriminates in favor of commercial advertising signs and against noncommercial advertising signs.

Sixth, Section 26-8(b)(6) of the ordinance allows commercial signs advertising a product or service of specific interest to the motoring public such as automobile service stations, restaurants and motels to be up to 70 feet high, while Section 26-8(c)(3) of the sign ordinance requires that other off-premise signs which may bear noncommercial messages be no more than 30 feet in height.

Seventh, Section 26-8(c)(9) of the ordinance prohibits off-premise signs which may bear noncommercial messages from being placed in marshlands and prohibits them from obstructing the view of marshlands, while the ordinance contains no such prohibition on on-premise signs which must bear commercial messages.

Eighth, Section 26-8(c)(10) of the ordinance prohibits off-premise signs which may bear noncommercial messages from being placed within 200 feet of the property line of a residence, church, school, park or public building, while the ordinance contains no similar prohibition on the placement of on-premise signs.

In each of the above-referenced instances, the sign ordinance attempts to elevate the communication of commercial information (on-premise signs) over the communication of noncommercial messages (off-premise signs). Thus, the ordinance concludes that the communication of commercial information is of greater value than the communication of noncommercial messages when it prohibits the placement of noncommercial signs within the Douglasville historic district; when it prohibits the placement of noncommercial signs within 300 feet of any officially designated historical site, while allowing the placement of commercial signs within the prohibited zone; when it requires that signs bearing noncommercial messages be no less than 1,000 feet apart, while containing no prohibition on the spacing of signs bearing commercial messages; when it prohibits the placement of off-premise signs on certain lots, while allowing on-premise signs on those lots; when it limits the number of off-premise signs at an interchange adjacent to an interstate highway to two, while providing no such limitation on the number of commercial signs at such interchanges; when it allows certain commercial signs added visibility by allowing them to be placed up to 70 feet high, while requiring that signs bearing noncommercial messages be no more than 30 feet in height; when it prohibits signs which may bear noncommercial messages from being

placed in marshlands and from obstructing the view of marshlands, while containing no such prohibition on signs bearing commercial messages; and when it prohibits signs which may bear noncommercial messages from being placed within 200 feet of the property line of a residence, church, school, park or public building, while containing no similar prohibition on the placement of signs which may bear commercial messages. Each of these provisions of the ordinance is directly in violation of the holding of *Metromedia* that a city may not conclude that the communication of commercial information is of greater value than the communication of noncommercial messages. Accordingly, the sign ordinance violates the First and Fourteenth Amendments and should be declared unconstitutional by this Court.

The Eleventh Circuit Court of Appeals concluded that the Douglasville ordinance is distinguishable from the ordinance declared unconstitutional by the *Metromedia* ruling and upheld the ordinance based upon the Sixth Circuit's decision in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988). This conclusion is erroneous.

In *Wheeler*, the Sixth Circuit found that a state statute and regulations were valid place and manner restrictions on billboards notwithstanding the plaintiff's arguments that they violated the Supreme Court's holding in *Metromedia*. The regulations in issue prohibited the placement of billboards in certain areas while allowing the erection of on-premise signs in those areas that contained a message relating to an activity or the sale of a product on the property on which they were located. 822 F.2d at 587-88. Noting that messages such as "abortion is murder" or "no-nukes" are permissible if an activity related to the messages was conducted on the premises, the Sixth Circuit found that the restrictions in issue permitted commercial and noncommercial signs in protected areas as long as the signs related to an activity on the premises. *Id.* at 590. As a result, the Sixth Circuit con-

cluded that the regulations before it were content neutral. *Id.* Adopting this analysis, the Eleventh Circuit found the Douglasville ordinance to be content neutral. Ignoring reality, the court held that "there is simply no basis for equating on-premise signs with commercial speech, and off-premise signs with noncommercial speech." 975 F.2d at 1509. The court came to this conclusion even though it conceded in the example it offered in support of its analysis that the only kind of noncommercial message petitioner could place on his own on-premise sign would be one related to the repair or maintenance of automobiles.[2] 975 F.2d at 1509. The court ignored altogether petitioner's point that he should be able to place any noncommercial message on his sign, not just one re-relating to the repair or maintenance of automobiles.

The Sixth Circuit's opinion in *Wheeler* and the Eleventh Circuit's reliance on it were error because the *Wheeler* court's analysis squarely conflicts with this Court's pronouncement in *Metromedia*. In *Metromedia*, this Court stated as follows:

> It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. The fact that the City may value commercial messages relating to on-site goods and services more than it values commercial communications relating to off-site goods and services does not justify prohibiting an occupant from displaying its own ideas *or those of others.*

453 U.S. at 512-13, 101 S.Ct. at 2895.

The teaching of *Metromedia* is that if an occupant is allowed to display any sign, he may not be prohibited from displaying his own ideas or those of others. The noncommercial speech allowed by the Kentucky on-premise sign regulation in the *Wheeler* case (which was

---

[2] The court stated that an auto mechanic's garage would be able to put up a noncommercial message relating to the recycling of used motor oil. 975 F.2d at 1509.

restricted to an activity conducted on the premises) is the identical noncommercial speech allowed by the City of Douglasville in this case (i.e., the speech is restricted to an activity conducted on the premises). Neither the Kentucky regulation nor the Douglasville ordinance allows the property owner to display his own ideas or the ideas of others. The ordinance before this Court and the statute before the court in *Wheeler* limit the expression of ideas to those related to activities being conducted on the premises. That being the case, the Douglasville ordinance (as did the regulations before the *Wheeler* court) violates the mandate contained in *Metromedia* that any person allowed to erect a sign must be allowed to display his own ideas or those of others. Accordingly, the decision of the Eleventh Circuit below contradicts the decision of the Supreme Court in *Metromedia* and should be reversed by this Court.

The First Circuit interpreted *Metromedia* in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989). In paraphrasing the Supreme Court's conclusion with respect to noncommercial messages, the *Ackerley* court stated as follows:

> *In other words, if the owner of Joe's Hardware wants to replace his "Joe's Hardware" sign with a sign saying "No Nukes", he must be allowed to do so.* This result follows logically from the First Amendment's value structure; if a commercial message overrides the city's aesthetics and safety interests, any message that is at least as important in the first amendment hierarchy also must override those interests. Because noncommercial speech is entitled to a higher degree of protection than commercial speech, San Diego could not decide that its aesthetic and safety interests were outweighed by the need to express commercial messages but not by the need to express noncommercial messages.

Id. at 517 (emphasis added).

As noted in *Ackerley*, because noncommercial speech is entitled to a higher degree of protection than commercial speech, the owner of any store must be able to replace his commercial on-site sign with a sign bearing any noncommercial message. That is prohibited by the Douglasville sign ordinance because the ordinance restricts the content of messages on on-premise signs by requiring that each of them direct attention to a building, profession, product, service, activity or entertainment conducted, sold or offered on the property upon which the sign is located. This prohibition violates the holding of *Metromedia* as clearly analyzed in *Ackerley*. *See also National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 n.3 (9th Cir. 1988).

The Second Circuit used identical reasoning in holding unconstitutional a sign ordinance adopted by the Town of Islip, New York. *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990). The Islip ordinance provided that on-premise signs "may only identify the person, establishment, the principle [sic] product and/or services available on the premises which contain the sign." 703 F. Supp. at 238. The Islip limitation on on-premise signs mirrors the Douglasville limitation upheld by the Eleventh Circuit in this case. In considering a *Metromedia*-based challenge to this portion of the ordinance, the district court stated as follows:

> Several of the defendants argued that the portions of their respective ordinances which allow only signs advertising the business conducted on the premises are merely content-neutral time, place, and manner restrictions. This court squarely rejects this contention. In addition to directly contradicting the plurality's opinion in *Metromedia*, this line of reasoning is internally flawed. By their own terms, the ordinances regulate according to the subject matter of the sign, *i.e.*, only a message concerning the business of that location is allowed. Therefore, under

> the ordinances as they exist, "Joe," for example, may put up a sign on his pizzeria saying "Joe's Famous Pizza" but may not put up a sign in the same spot, of the same size, using identical lettering and colors, expressing his view that "abortion is murder." Nor may he lease this same sign to "Bill" to publicize his message that "free choice is the only choice." Thus, whether the sign is permitted depends solely upon the content of the message being conveyed.

703 F. Supp. at 239-40. Citing *Metromedia*, the Second Circuit affirmed the district court's order with respect to the Islip ordinance, finding it "defective because it impermissibly discriminates against noncommercial speech in favor of commercial speech." 900 F.2d at 556. Thus, without making an express reference to the decision of the First Circuit in *Ackerley* or of the Sixth Circuit in *Wheeler*, the Second Circuit adopted the analysis of the First Circuit in *Ackerley* and rejected the analysis of the Sixth Circuit in *Wheeler*. The panel's decision in *Town of Babylon* was followed by another Second Circuit panel in *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2nd Cir. 1991), which affirmed a district court's decision holding the sign ordinance of the Town of Niagara in violation of the First Amendment. The *Niagara* panel noted that due to the limitation on the content of on-site advertising to a description of business transacted, services rendered, or goods sold and produced on the premises where the sign is located, "a property owner could erect a sign that said 'Fried Chicken Sold Here' but not one saying 'Save the Whales'. . . ." The Second Circuit agreed with the district court that the ordinance violated the First Amendment and invalidated the ordinance as a whole. 942 F.2d at 146.

In addition to the First and Second Circuits, other courts have applied *Metromedia* and declared ordinances similar to the Douglasville ordinance to be unconstitutional. One case in particular, *Metromedia, Inc. v. Mayor and City Council of Baltimore*, 538 F. Supp. 1183 (D.Md.

1982), contains facts strikingly similar to those in the case at bar. In *Mayor and City of Council of Baltimore*, a city ordinance was challenged because it prohibited signs other than on-premises signs in a particular area of the city just as the Douglasville ordinance prohibits off-premises signs, but allows on-premise signs, in the Douglasville historic district. The district court held in *Mayor and City Council of Baltimore* that the ordinance was constitutionally defective in one of the ways that the *Metromedia* court found the San Diego ordinance defective, that being in its discrimination against noncommercial messages. *Id.* at 1187. The flaw in the Baltimore ordinance was that an owner or occupant within the affected area could affix a sign identifying his premises, just as the petitioner may in the case at bar, but could not affix a sign displaying his ideas or those of others. *Id.* The exact same result obtains under the challenged Douglasville ordinance; consequently, the Douglasville ordinance is also unconstitutional.[3]

---

[3] The *Wheeler* court attempted to distinguish *Mayor & City Council* by characterizing the ordinance in issue there as one which allowed an owner or occupier of land within the affected area to affix a sign identifying the premises, but prohibiting signs displaying messages other than identification of the premises. 822 F.2d at 594. The *Wheeler* court misread the Baltimore ordinance in issue in *Mayor & City Council* for in section 3(4)(a) it clearly allowed signs "identifying the property where they are installed *or identifying the use conducted thereon* . . . ." 538 F. Supp. at 1185 (emphasis added). As a result, the Baltimore ordinance stricken in *Mayor & City Council* was exactly like the ordinance reviewed by the *Wheeler* court, even though the *Wheeler* court believed it was different. Like the signs in *Wheeler*, a sign erected in the Midtown Belvedere area of Baltimore could carry a "George Wallace for President" message if activity in support of his candidacy was conducted on the premises, but was prohibited from carrying that message if it were not. The ordinance was stricken in *Mayor & City Council* because it prohibited a shop owner's communication of a message not relating to his premises; the same deficiency appearing in the Douglasville ordinance before this court and in the Kentucky regulation upheld in *Wheeler*. 538 F. Supp. at 1187.

Other sign ordinances stricken as being unconstitutional under the *Metromedia* holding include the ordinances challenged in *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Jackson v. City Council of Charlottesville*, 659 F. Supp. 470 (W.D. Va. 1987), *modified on other grounds*, 840 F.2d 10 (4th Cir. 1988); *Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917 (Va. 1988); *Norton Outdoor Advertising, Inc. v. Village of Arlington Heights*, 69 Ohio State 2d 539, 433 N.E. 2d 198 (1982); and *Metromedia, Inc. v. City of Des Plaines*, 26 Ill. App. 3d 942, 326 N.E. 2d 59 (1st Dist. 1975). In these cases, courts applying the *Metromedia* holding have consistently stricken ordinances such as that enacted by the City of Douglasville which discriminate against noncommercial speech in favor of commercial speech. The City of Douglasville ordinance before this Court clearly favors commercial speech over noncommercial speech and certiorari should be granted in this case so that under the holding of *Metromedia* and its progeny the ordinance may be declared unconstitutional by this Court.

II. THE COURT OF APPEALS' DECISION UPHOLDING THE SECTION OF THE DOUGLASVILLE SIGN ORDINANCE WHICH ALLOWS THE PLACEMENT OF CERTAIN NONCOMMERCIAL MESSAGES WITHOUT A PERMIT, WHILE REQUIRING OTHERS TO BE PERMITTED, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Douglasville sign ordinance further violates the First and Fourteenth Amendments because of the regulations contained in Section 26-17. That section allows the placement of certain noncommercial signs without a permit.[4] By enacting Section 26-17, the City of Douglasville

---

[4] Section 26-17 of the Douglasville sign ordinance, which is reprinted in its entirety in the appendix, exempts from the permit fee requirements of the ordinance one wall sign per building side announcing the business located inside the building to which the sign

has determined to allow signs conveying certain noncommercial messages to be displayed without a permit, while denying that right to those posting other noncommercial messages. In *Metromedia*, this Court examined a similar list [5] of signs favored by the challenged San Diego ordinance and concluded as follows:

> With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co.*, 447 U.S. at 538, 100 S.Ct. at 2333.

453 U.S. at 515, 101 S.Ct. at 2896. Thus, the Court in *Metromedia* struck the challenged San Diego ordinance for containing a provision almost identical to Section 26-17 of the Douglasville ordinance. This provision is void because the Constitution forbids the selective restriction of protected noncommercial speech (by requiring certain

---

is attached. The ordinance further exempts real estate "for sale" signs from both permit and permit fee requirements. In addition, no permit or permit fee is required for bulletin boards for public, charitable, educational or religious institutions when the sign is located on the premises of said institution. Also exempt from permit and permit fee requirements are project location signs denoting the architect, engineer, contractor or financial institution involved when placed upon work under construction. Finally, the ordinance exempts from the permit requirement signs directing traffic movement. Bulletin boards, which are referred to in Section 26-17 of the ordinance, are defined in Section 26-4 of the ordinance as "a sign which primarily displays the name of a noncommercial place of public assembly and announces the upcoming event(s) of that organization."

[5] Included were fixed signs, which could be used to identify any piece of property and its owner; signs displaying religious symbols, commemorative plaques of recognized historical societies and organizations; signs carrying news items or telling the time or temperature; signs erected in discharge of any government function; or temporary political campaign signs. 453 U.S. at 514, 101 S.Ct. at 2896.

noncommercial speech to obtain a permit while exempting other noncommercial speech) based on its content. Other courts[6] have stricken similar provisions based upon the holding of *Metromedia*, and this Court should grant certiorari in this case to correct the error committed by the Eleventh Circuit Court of Appeals in failing to strike this portion of the Douglasville ordinance.

III. SECTION 26-18 OF THE DOUGLASVILLE SIGN ORDINANCE IS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE THE BOND REQUIREMENT CONTAINED THEREIN IS NOT THE LEAST INTRUSIVE MEANS OF REQUIRING THE REMOVAL OF POLITICAL SIGNS AFTER AN ELECTION AND BECAUSE IT REGULATES POLITICAL SPEECH MORE STRINGENTLY THAN NONPOLITICAL SPEECH.

Section 26-18 of the Douglasville sign ordinance requires those persons interested in advertising or calling attention to a specific event, political candidate or political issue to obtain a temporary permit prior to posting a sign of that nature. A permit for such a sign will not be issued until the applicant files a bond by a licensed surety company or a cash bond in the amount of $500. *Id.* Applicants for all other types of permits are not required to post a bond (except for applicants for permits for portable display signs for special events). *Id.* Thus, applicants for political signs are burdened with a financial requirement not applicable to others.

Section 26-18 of the ordinance is a limitation on the fundamental right of political speech. The First Amendment has its fullest and most urgent application in the case of regulation of the content of political speech.

---

[6] *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988); *Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917, 926 (Va. 1988).

Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Because the Douglasville bond requirement impinges political speech, it must be narrowly drawn and further a sufficiently substantial governmental interest. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Furthermore, a court reviewing such an ordinance must not only assess the substance of the governmental interests asserted, but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. *Id.*

The Eleventh Circuit concluded that the bond requirement is permissible for the reason that the regulation is not substantially broader than necessary. 975 F.2d at 1513. The court's conclusion is in conflict with the aforesaid test prescribed by this Court. Petitioner's application for a writ of certiorari should be granted so this error can be reversed.

The purpose of the bond requirement advanced by the City is the prevention of clutter. Without having introduced any evidence on the matter below, the City contended that the "only way to insure removal of (such) signs is to require a bond prior to the posting of any signs." The respondent's unsubstantiated argument is without merit because numerous less restrictive means of causing removal of temporary and political signs could be utilized. For example, the City could punish those who fail to remove their signs after an election or event. The names and addresses of those posting such signs could be required to be imprinted on each sign, as required under federal law, 11 C.F.R. § 110.11, so the City would know who to prosecute in the event of a violation. The same ordinance could provide that signs in violation of the identification requirement would be subject to immediate removal by the City.

In *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), this Court reviewed the antileafletting ordinances of four cities. Several municipalities argued that their antileafletting ordinances were designed to prevent littering of the streets. The Court did not deny that the ordinances would further that purpose, but it concluded that the cities' interest in preventing littering was not sufficiently strong to justify the limitation on First Amendment rights. The Court pointed out that the cities were free to pursue other methods of preventing littering, such a punishing those who actually threw papers on the streets. 308 U.S. at 162, 60 S.Ct. at 151. The Douglasville requirement of the posting of a $500 bond for an individual desirous of posting only one political sign as a means for keeping the City clean is unduly burdensome under *Schneider*, *supra*. For that reason, the Eleventh Circuit erred in upholding the requirement and certiorari should be granted to correct the error.

Another flaw in the bond requirement is the financial impact it has on an individual political candidate, especially a challenger to an incumbent for a local election. As stated in *Buckley v. Valeo*, 424 U.S. 1, 49 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976), the "First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion".

While the very question in issue here has not squarely been confronted by the Supreme Court, it has been decided by the Ninth Circuit in a manner inconsistent with the Eleventh Circuit below. In *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977), the ordinance under scrutiny required a $5.00 refundable removal deposit for posting a political sign. The Ninth Circuit found the removal deposit might, as a practical matter, preclude erection of all but a few large signs for some campaigns. The court concluded that "means less

restrictive of free expression must be relied upon to serve the interests of community tidiness and aesthetics." *Id.* at 1372. A subsequent decision of the Ninth Circuit invalidated an ordinance almost identical to the Douglasville ordinance requiring that any person posting political campaign signs must deposit a $100 cash bond with the city to insure removal of the signs. *Verrilli v. City of Concord*, 548 F.2d 262, 264, *modified on other grounds*, 557 F.2d 664 (9th Cir. 1977). The Fourth Circuit recently cited *Baldwin, supra*, and *Verrilli, supra*, in holding unconstitutional a sign ordinance limiting to two the number of temporary political campaign signs that could be posted on private property. *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). The Fourth Circuit found that the challenged ordinance infringed on First Amendment rights because it was not narrowly tailored to further its substantial interests in promoting aesthetics and traffic safety and left no viable alernative means of political speech. 983 F.2d at 594-95. These decisions are in direct conflict with the decision of the Eleventh Circuit below, making this issue appropriate for the grant of a writ of certiorari under the rules of this Court.

The bond requirement of the Douglasville sign Ordinance must be stricken for the same reasons the ordinances were stricken in *Schneider, supra, Baldwin, supra*, and *Verrilli, supra*. The effect desired, the removal of signs following a political campaign, can be accomplished by much less restrictive means including the penalizing of those who fail to remove their signs. The Eleventh Circuit erred in refusing to follow the Ninth Circuit and hold this section of the ordinance unconstitutional.

In another case involving governmental restrictions on speech, *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), this Court applied equal protection analysis. There, the city had enacted an ordinance making it a misdemeanor to

picket or demonstrate on a public way within 150 feet of a school building, but allowing the peaceful picketing of any school involved in a labor dispute. The city arrested and charged a peaceful picketer for violation of the ordinance when he walked by a city school with a sign protesting the school's practice of racial discrimination. The Court noted that the city treated some picketing differently from other picketing and analyzed the ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. The crucial question, the Court stated, was whether there was an appropriate governmental interest suitably furthered by the differential treatment. 408 U.S. at 95; 92 S.Ct. at 2290. The Court continued:

> There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. . . . Guided by these principles, we have frequently condemned discrimination among different users of the same medium for expression.

408 U.S. at 96, 92 S.Ct. at 2290. Under this analysis, the Court concluded that in the case before it the ordinance impermissibly discriminated among pickets based on the content of their expression and struck the ordinance under the Equal Protection Clause. *Id.* at 102, 92 S.Ct. at 2294. *See also Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (analyzing statute under both First Amendment and equal protection approaches); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Bacon v. Bradley-Bourbonnais High School District*, 707 F.Supp. 1005, 1009-10 (C.D.Ill. 1989) (school district policy prohibiting all expressive activity on school premises except those of its own teachers violates individual's right to equal protection); L. Tribe, *American Constitutional Law*, 1459 (2nd Ed. 1988) (noting that

certain ordinances may be stricken under equal protection or due process analysis). Treating those desirous of posting political messages differently from those posting commercial messages, which the Douglasville ordinance does by requiring the former to post bonds while exempting the latter, violates the mandate of *Mosley* and the Equal Protection Clause by placing burdens on political speech not faced by commercial advertisers. Accordingly, petitioner's application for certiorari should be granted to correct the error of the Eleventh Circuit in failing to strike Section 26-18 of the Douglasville sign ordinance as violative of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

This case is appropriate for the grant of a writ of certiorari under Sup. Ct. R. 10.1(a) and (c) because the Eleventh Circuit Court of Appeals and the Sixth Circuit Court of Appeals have rendered important decisions on a First Amendment issue in conflict with the decisions of the First and Second Circuit Courts of Appeals on the same matter and have decided a federal question in a way that conflicts with a controlling decision of this Court, *i.e.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). Furthermore, with respect to the provisions of the challenged ordinance requiring a bond as a condition precedent to the issuance of a permit allowing a political sign, the Eleventh Circuit has rendered a decision in conflict with the decision of the Ninth Circuit Court of Appeals on the same matter and has decided a federal question in a way that conflicts with applicable decisions of this Court, *i.e.*, *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), and *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), among others. For these reasons, petitioner

respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

DAVID H. FLINT *
MARK W. FORSLING
SCHREEDER, WHEELER & FLINT
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450
Attorneys for Petitioner

March 25, 1993

* Counsel of Record